

The EPA Administrator, Lisa P. Jackson, signed the following proposed rule on 05/11/11, and EPA is submitting it for publication in the *Federal Register* (FR). While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule for purposes of compliance. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's FDSys website (<http://fdsys.gpo.gov/fdsys/search/home.action>) and on Regulations.gov (<http://www.regulations.gov>) in Docket No. EPA-HQ-OAR-2007-0877. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.

6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 60 and 63

[EPA-HQ-OAR-2002-0051; EPA-HQ-OAR-2007-0877; FRL -]

RIN 2060-AQ93

**National Emission Standards for Hazardous Air Pollutants From
the Portland Cement Manufacturing Industry and Standards of
Performance for Portland Cement Plants**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Denial in part and grant in part of petitions to reconsider.

SUMMARY: The Environmental Protection Agency (EPA or Agency) is denying in part and granting in part the petitions to reconsider the final revised National Emission Standards for Hazardous Air Pollutants emitted by the Portland Cement Industry and the New Source Performance Standards for Portland Cement Plants issued under sections 112(d) and 111(b) of the Clean Air Act,

respectively. The EPA is also denying all requests that the EPA issue an administrative stay of the National Emission Standards for Hazardous Air Pollutants and the New Source Performance Standards.

DATES: This action is effective **[INSERT DATE OF PUBLICATION OF THIS NOTICE IN THE FEDERAL REGISTER]**.

ADDRESSES: The EPA's docket for this action is Docket ID No. EPA-HQ-OAR-2002-0051. All documents in the docket are listed on the <http://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information where disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the EPA's Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004. This Docket Center is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

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SUPPLEMENTARY INFORMATION:

On August 6, 2010, the EPA signed a final rule establishing and amending various air emission limits applicable to the Portland cement industry. See 75 Fed. Reg. 54970 (Sept. 9, 2010). The rule establishes National Emission Standards for Hazardous Air Pollutants (NESHAP) for emissions of mercury, total hydrocarbons (THC), and particulate matter (PM) from new and existing cement kilns located at major and area sources, and for emissions of hydrochloric acid (HCl) from new and existing kilns located at major sources. The rule also establishes New Source Performance Standards (NSPS) for emissions of PM, nitrogen oxides, and sulfur dioxide at cement kilns that commence construction, modification, or reconstruction after June 16, 2008.

Various entities representing both the regulated industry and the environmental community have petitioned the EPA for

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reconsideration of various standards in these rules, in particular the NESHAP. A number of industry petitioners also requested that the EPA issue an administrative stay of the NESHAP and NSPS. For the reasons stated below, the EPA is denying reconsideration on certain issues raised in the petitions and is granting reconsideration on a number of other issues. The EPA is also denying all requests that it issue an administrative stay.

I. Standard for Reconsideration

Section 307(d)(7)(B) of the Clean Air Act (CAA) states that: "Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the

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rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b)). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed pending such reconsideration, however, by the Administrator or the court for a period not to exceed three months."

As to the first procedural criterion for reconsideration, a petitioner must show why the issue could not have been presented during the comment period, either because it was impracticable to raise the issue during that time or because the grounds for the issue arose after the period for public comment (but within 60 days of publication of the final action).

In the EPA's view, an objection is of central relevance to the outcome of the rule only if it provides substantial support for the argument that the promulgated regulation should be revised. See, e.g., the EPA's Denial of the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202 of the Clean Air Act, 75 FR 49556, 49561 (Aug. 13, 2010). This interpretation is appropriate in light of the criteria adopted by Congress in this and other

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provisions in section 307(d). Section 307(d)(4)(B)(i) provides that "[a]ll documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability." This provision draws a distinction between comments and other information submitted during the comment period, and other documents which become available after publication of the proposed rule. The former are docketed irrespective of their relevance or merit, while the latter must be docketed only if a higher hurdle of central relevance to the rulemaking is met.

For more extended discussions of the standard for reconsideration under section 307(d)(7)(B), please see 75 FR 49556, 49560-63 (August 13, 2010) and 76 FR 4780, 4786-88 (January 26, 2011).

II. The Petitions for Reconsideration

A. Petition of the Portland Cement Association (PCA)

1. PCA maintains that after the close of the comment period on the proposed cement NESHAP, the EPA proposed inter-related rules regulating Commercial and Industrial Solid Waste Incinerators (CISWI) and proposing a definition of solid waste for non-hazardous secondary materials. Petition p. 2. PCA alleges that

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these proposed rules "eviscerate the statistical underpinning for the NESHAP rule." Petition p. 2. PCA states that under the proposed rule defining non-hazardous secondary materials that are solid wastes ("solid waste definition rule"), many cement kilns would have been considered to be incinerators (i.e., units that combust "solid waste," as that term is defined by the Administrator under RCRA, see section 129(g)(6)), rather than cement kilns. PCA further states that under the proposed waste definition rule, virtually all of the cement kilns comprising the pool of best performers for each of the cement NESHAP floors would be incinerators since they burn secondary materials that would have been defined as solid waste under the proposed solid waste definition rule. Although acknowledging that the EPA had discussed in the proposed cement NESHAP how it intended to classify cement kilns that burn secondary materials (Petition p. 8), PCA maintains that it had no notice of the potential impact of the CISWI rule and solid waste definition rule until the EPA proposed a definition of solid waste, and, in particular, that PCA was unaware of the potential practical implications of the issue until the EPA proposed a solid waste definition. Petition pp. 10, 12. Petitioners maintain that the EPA cannot permissibly classify the same kilns as affected sources under both rules,

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and requests that the EPA stay the Portland cement NESHAP administratively pending reconsideration of the issue.

2. PCA next maintains that the EPA adopted standards for open clinker cooler piles in the NESHAP without giving proper notice of what those standards might be. Petition p. 11.

3. PCA further requests reconsideration of the standards for startup and shutdown operations. PCA argues that the final standards deviated from those proposed, because the EPA had proposed that the same standards that apply during normal operation also apply during startup and shutdown operations, whereas the final rule adopts standards for startup and shutdown that differ from those applicable during normal operation. Petition p. 14. PCA maintains that it had no notice of the data on which such standards were based, because the standards are not based on emissions data. Id. p. 15. The petition further states that the standards for startup and shutdown were adopted in disregard of the requirements of section 112(d)(3) of the CAA, again largely because the standards are not based on emissions data. Id.

4. In the final rule, the EPA adopted a provision establishing an affirmative defense to civil penalties for exceedances of emission standards which result from malfunction events. PCA

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requests that the EPA reconsider this affirmative defense provision, which it characterizes as overly cumbersome, and issued without notice and adequate opportunity for public comment. Id. at 16.

5. PCA also requests that the EPA reconsider the standards for PM, including the new source standard for PM in the NSPS. Id. PCA alleges that the EPA “reduce[d] the PM limits ... dramatically” between proposal and final rule, and that the change was based on information hand-picked by the EPA which information was not known to petitioners. Id. In a follow-up letter of December 14, 2010, PCA expanded on its petition to state that the key change between proposal and final rule, made without proper notice, was to express the PM standard as a 30-day average and to use a statistical methodology (Upper Prediction Limit, or UPL) in calculating that limit. December 14 Letter p. 3.

6. PCA also requested that the EPA reconsider a number of issues of a more technical nature (many of which pertain to the standards for open clinker piles). Petition Exhibit 1.

B. Petition of Eagle Materials

Eagle Materials challenges application of the NESHAP’s monitoring requirements to sources equipped with monovents

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(vents on the top of a control device rather than a single stack). Although acknowledging that this issue was presented during the public comment period, Eagle Materials maintains that the EPA's disposition of the issue was based on technical assumptions which are unfounded and unanticipated by Eagle and other commenters. Eagle Materials also maintains that the EPA adopted standards for clinker storage piles without providing adequate notice of what those standards might be.

C. Petitions of Sierra Club, Downwinders at Risk, Friends of Hudson, Huron Environmental Activist League, Desert Citizens Against Pollution, Montanans Against Toxic Burning, and the Natural Resources Defense Council

A number of environmental groups filed petitions requesting that the EPA reconsider the provision establishing an affirmative defense to civil penalties for emission exceedances demonstrated to have occurred as a result of a malfunction event (as defined). The petitions maintain that the EPA adopted this provision without adequate notice and opportunity for public comment.

III. Decision on Issues Raised in the Petitions

A. Issues on Which the EPA is Denying Reconsideration

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1. **Relationship between Portland Cement NESHAP, Solid Waste Definition and CISWI Rule**

PCA maintains that "EPA proposed the CISWI/'solid waste' definition rules after the comment period closed on the NESHAP rule, foreclosing any real opportunity for PCA to assess and comment on the impacts of the NESHAP. Indeed, it was not until EPA proposed the subsequent CISWI/'solid waste' rules that ... PCA had notice with any real specificity of the number of cement facilities that may end up being regulated as CISWI facilities." Petition p. 8. The EPA is denying rehearing on this issue because the petitioners have failed to demonstrate that it was impracticable to raise their objection during the public comment period. In addition, the fact that some cement kilns may have a later change of regulatory classification after the NESHAP is promulgated is not an issue of central relevance to the outcome of the NESHAP rule, as required by the statutory standard for reconsideration. Finally, as discussed below, even if the impacts of the solid waste rule had been assessed, it would not have made a significant difference in the final Portland Cement NESHAP.

A. Was it impractical to raise the objection within the comment period?

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Section 307 (d) (7) (B) requires the EPA to grant reconsideration of an issue "[i]f the person raising the objection can demonstrate to the Administrator that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment". PCA could have objected during the comment period on the proposed Portland Cement NESHAP to EPA's classification of all Portland cement kilns burning secondary materials¹ as cement kilns. In the proposed Portland Cement NESHAP, the EPA proposed to classify all cement kilns, including those burning secondary materials, as cement kilns for the NESHAP rulemaking, and explained why it was doing so. The EPA discussed the interplay between the cement kiln NESHAP and the forthcoming rules for incinerators which burn solid waste, noting that "some Portland cement kilns combust secondary materials as alternative fuels". 74 FR at 21138. The EPA then

¹ A "secondary material" is a material that can potentially be classified as a solid waste under the Resource Conservation and Recovery Act when recycled. 50 FR 616 n. 4 (Jan. 4, 1985). Under the newly adopted regulatory definition of solid waste, secondary materials encompass "any material that is not the primary product of a manufacturing or commercial process, and can include post-consumer material, off-specification commercial chemical products or manufacturing chemical intermediates, post-industrial material, and scrap." 40 CFR section 241.2.

stated that because there was no regulatory definition of solid waste that would distinguish which of these alternative fuels burned by cement kilns were wastes and which were not, the EPA would therefore classify all of the units as cement kilns. Id. The EPA reasoned that unless and until the Agency adopts a definition of solid waste classifying the alternative fuels, cement kilns burning secondary materials as fuels or otherwise using secondary materials are lawfully classified as cement kilns and rules for cement kilns therefore would apply to them. Id. The EPA also articulated the principle of which PCA states it lacked notice: the NESHAP would be based on the performance of all devices which were cement kilns at the time of the Portland Cement NESHAP rulemaking. Id. The EPA further found that combustion of secondary materials as alternative fuels by cement kilns "did not have any appreciable effect on the amount of hazardous air pollutants (HAP) emitted by any source." Id. The record for the proposed rule included an inventory of every material burned by a large group of cement kilns over a 30-day period, including all of those comprising the pool of best performers for mercury.²

² See docket item EPA-HQ-OAR-2002-0051-2043.

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Neither PCA nor any other commenter objected to any aspect of the issue of the interplay between the cement kiln NESHAP and the CISWI/waste definition rules during the comment period.³ PCA has consequently failed to satisfy the requirement of section 307 (d) (7) (B) that it was impractical to raise the issue during the public comment period or that the grounds for their objection arose after the close of the comment period.

Petitioners maintain that "it was impossible for PCA to provide informed comments on the interplay between the CISWI/'solid waste' definition rules and the NESHAP rule" until the Agency proposed those rules on April 29, 2010, after the close of the comment period in the NESHAP. Petition p. 10. Acknowledging that the EPA had already raised the issue in the proposed cement NESHAP, petitioners maintain that "[a] generic comment is not adequate to put stakeholders on fair notice that the CISWI/'solid waste' definition rules could fundamentally

³ Two commenters (#s 2816 and 2846) noted EPA's approach. One of these commenters approvingly summarized EPA's position to classify all cement kilns as cement kilns, based on their status at the time of the NESHAP. The other commenter simply summarized EPA's position. Neither of these comments is an objection putting EPA on notice that a commenter disagreed with EPA's approach or otherwise raising "with reasonable specificity" (section 307 (d) (7) (B)) any issue that EPA's approach was objectionable for legal or policy reasons.

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change the scope of the NESHAP source category.” Id.⁴ But the EPA’s discussion at proposal was not generic. It was a considered discussion stating the approach to classification the EPA intended to adopt (and did adopt) in the final rule, citing moreover to the EPA’s Advance Notice of Proposed Rulemaking (74 FR 42, January 2, 2009) which had discussed the universe of secondary materials burned by units including cement kilns, and the considerations the Agency might use in ultimately classifying these materials by rule as waste or non-wastes. The administrative record likewise contained item-by-item accounting – cited to by the EPA when presenting the issue of kiln classification for public comment – of every secondary material burned by a large group of cement kilns over an extended period.

PCA appears to be stating that although the EPA had raised the issue of kiln classification at proposal, the practical implications of the EPA’s approach were not clear until the EPA proposed a solid waste definition and CISWI standards. But the EPA stated that it would classify all cement kilns as cement kilns during the NESHAP rulemaking unless a final definition of

⁴Nonetheless, had the final solid waste definition been in place at the time of the final Portland Cement NESHAP rulemaking, there would have been only modest change in the scope of the NESHAP source category and the final standards would have been largely unaltered. See Table 1 below.

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solid waste changed their regulatory status prior to the completion of the section 112 Portland Cement NESHAP. That issue was unaltered by the EPA issuing a proposed solid waste definition and proposed CISWI standards. Just like the proposed cement NESHAP, the final cement NESHAP was based on the performance of units classified as cement kilns at the time of the cement NESHAP rulemaking. This included all cement kilns burning alternative fuels. PCA's objection is no different before the proposed solid waste definition and CISWI rules than after that proposal. The same issue is presented now as was presented at proposal: whether devices which are classified as cement kilns in the absence of a regulatory waste definition are properly so classified if they were burning secondary materials that might ultimately be classified as solid wastes. Moreover, the type of secondary materials the cement kilns were burning was well-documented in the NESHAP administrative record (and known to PCA in any case).⁵ PCA's decision not to comment on the issue because of perceived lack of practical effect was their choice, not the result of lack of notice. For this reason, PCA's statement that it could not gauge the impact of the NESHAP until

⁵ Fuels Use in Portland Cement Kilns, April 25, 2011.

the proposed waste definition/CISWI rule appeared (Petition p. 10) misses the point. Those impacts were going to be the same because the EPA had made clear that it would continue to classify cement kilns as cement kilns so long as that remained their legal status. This status remained the same throughout the rulemaking.

B. Are petitioners' objections of central relevance to the outcome of the rule?

Section 307(b) (7) (B) also requires that for reconsideration to be required, objections must be "of central relevance to the outcome of the rule". The EPA does not believe that is the case here, for reasons both legal and practical.

The EPA believes that it validly based the NESHAP on the performance of devices which were cement kilns at the time of the rulemaking. See section 112(d) (3) (A) which states that maximum achievable control technology (MACT) floors for existing sources are to reflect performance of sources for which the EPA has emissions information, indicating that standards are to reflect sources' legal status and performance at the time of the rulemaking.⁶ Later rules that prospectively establish the

⁶ There is no valid argument that cement kilns burning alternative fuels were already commercial and solid waste incinerators at the time of the NESHAP rulemaking. First, all of This document is a prepublication version, signed by EPA Administrator, Lisa P. Jackson on 05/11/2011. We have taken steps to ensure the accuracy of this version, but it is not the official version.

classification of certain of the alternative fuels that these kilns burned does not alter these kilns' status - cement kilns - at the time of the cement NESHAP rulemaking. This is all that matters. The solid waste definition rule adopted a *half year* after the *signature of the* Portland Cement NESHAP rule is not relevant to the cement kilns' classification at the time of the NESHAP rulemaking.

PCA argues, however, that the situation here is controlled by the D.C. Circuit's opinion in NRDC v. EPA, 489 F. 3d 1250 (D.C. Cir. 2007) ("Boiler MACT"). Petition p. 8. We disagree. In that case, the EPA had adopted a definition of "solid waste incineration unit" which classified "commercial or industrial

these kilns certified that they were cement kilns in compliance with the 1999 MACT standards for the Portland Cement category (pursuant to 40 CFR sections 63.1353 (b) (5) and 63.9(h)). Second, the status of these alternative fuels as solid wastes or not solid wastes could not be determined in the absence of a regulatory definition addressing the status of those fuels. 74 FR at 21138. Although there is a statutory definition of solid waste in the Resource Conservation and Recovery Act (at section 1004 (27)), that definition does not apply directly to section 129, but must be implemented by means of an EPA-promulgated regulation. See CAA section 129 (g) (6) ("the ter[m] 'solid waste' ... shall have the meanin[g] established by the Administrator pursuant to the Solid Waste Disposal Act".) Equally important, the status of alternative fuels cannot be determined from the statutory definition alone (as illustrated by the different regulatory classifications of different alternative fuels in the recently-adopted definition of non-hazardous secondary materials, and the significant changes between proposal and final rule that EPA made in classifying alternative fuels).

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waste" to include only solid waste combusted in units which do not recover energy. 489 F. 3d at 1258. The EPA issued MACT standards predicated upon no boilers being incinerators due to their energy recovery purpose and design. The court held that the definition was impermissible in that it classified units burning solid waste as boilers rather than as commercial and industrial solid waste incineration units and noted that "[t]he effect of these definitions is to substantially reduce the number of commercial or industrial waste combustors subject to section 129's standards". Id. The court continued:

[Since the Court is requiring] EPA to revise the CISWI Definitions Rule..., the Boilers Rule will need to be revised as well because the universe of boilers subject to its standards will be far smaller and more homogenous after all CISWI units ... are removed from its coverage. Given the likelihood (if not certainty) that the Boilers Rule will change substantially as a result of our vacatur of the challenged "solid waste" definition, we believe the Boilers Rule should be vacated in its entirety and remanded for EPA to repromulgate after revising the CISWI Definitions Rule. 489 F. 3d at 1261.

The NESHAP rule at issue in Boiler MACT was thus promulgated when there was a definition of commercial and industrial wastes (as incorporated in the definition of solid waste incinerator, 489 F. 3d at 1261), which classified all units as either boilers or incinerators, albeit improperly. Here, in contrast, there was no regulatory definition of solid waste that determined (or otherwise addressed) the status of the

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alternative fuels burned by cement kilns. Thus, cement kilns burning alternative fuels or other secondary materials were not classified as incinerators during the cement NESHAP rulemaking, but as cement kilns. The cement NESHAP therefore was and is based exclusively on the performance of cement kilns, as properly classified at the time of the rulemaking.⁷ PCA states that the EPA cannot promulgate a NESHAP rule based on calculations that include CISWI units, but the EPA has not done that. Petition p. 10. All of the cement kilns were cement kilns during the NESHAP rulemaking.

Moreover, although the EPA recognizes that there is case authority that agencies are compelled to reopen rules when the rules' fundamental factual basis (or other essential premise) is altered by later events,⁸ the EPA does not believe that the

⁷ As noted earlier, all cement kilns certified to EPA that they were cement kilns in compliance with the applicable section 112 (d) standards for cement kilns up to and through the time of the amendments to the Portland Cement NESHAP.

⁸ See Geller v. FCC, 610 F. 2d 973, 979-80 (D.C. Cir. 1979) (rules justified as needed to encourage passage of federal copyright legislation, without any further justification that the rules were in the public interest, may have lacked any nexus with the public interest after passage of the copyright legislation and the Federal Communications Commission could therefore be compelled to reexamine the rule); RSR v. EPA, 102 F. 3d 1266, 1270 (D.C. Cir. 1997) (noting that in Geller the sole basis for the challenged rule had "long since evaporated" and that agency was compelled to reexamine the rule in light of the "abnormal circumstances" of the case).

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factual basis of the NESHAP has changed. The units on which the standard was based were cement kilns at the time of the NESHAP rulemaking, and, consistent with section 112(d)(3), the EPA based the NESHAP on that classification.

PCA also states that the EPA committed to reconsider the cement NESHAP once the CISWI/"solid waste" definition rules were finalized. Petition p. 11. This is incorrect. The EPA never committed to reopening a promulgated rule for the cement source category or any other. In the preamble to the proposed cement NESHAP, the EPA stated: "EPA is basing all determinations as to source classification on the emissions information now available, as required by section 112(d)(3), and will necessarily continue to do so until the solid waste definition discussed above is promulgated." 74 FR at 21138; see also 75 FR at 54972 which contains similar language. This statement means no more than it says: if the EPA had promulgated a final definition of solid waste that changed the classification of these kilns during the rulemaking, then the EPA would have based that NESHAP on that new classification. That did not occur during the Portland Cement NESHAP rulemaking. The quoted language cannot fairly be read to say that the EPA would revise standards for source categories properly classified at the time

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of the NESHAP based on a post-promulgation definition of solid waste whether that category be Portland cement kilns, lime kilns, or any other source category which once burned secondary materials later defined as solid waste.

The implications of PCA's position are that all NESHAPs have to be reopened and amended if units in the source category were burning secondary material that were classified post-promulgation as solid wastes by a later rule. Potential examples are lime kilns, chemical recovery units, as well as cement kilns (including the 1999 dioxin standard for cement kilns, which was not reopened as part of the 2010 rulemaking amending the NESHAP). The EPA does not accept this position. All of the NESHAPs are properly based on the units' classification at the time of the rulemaking.⁹ PCA's position is disruptive to the rulemaking process and would potentially lead to frequent and substantial uncertainty for the regulated community and other stakeholders

The EPA similarly disagrees with the premise that the Agency cannot develop standards for any source category which

⁹ For the same reason, EPA cannot be deemed to have constructively reopened the NESHAP when it issued the solid waste definition and CISWI rules. Nothing in the later rules changes the kilns' status as cement kilns at the time of the cement NESHAP rulemaking.

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burns materials which might ultimately be classified as solid waste until developing and finalizing a solid waste definition rule. This conflicts with the EPA's obligations under the statute, consent decrees, and settlement agreements (including the settlement agreement requiring the EPA to issue the NESHAP for Portland cement by August 2010) to complete NESHAPs for source categories listed pursuant to section 112 (c)(1) by dates certain. The EPA's obligation in fact is to issue NESHAPs based on the emissions information before it at the time of the rulemaking (see section 112(d)(3)(A)), which is what it did here. NESHAPs are thus necessarily based on the snapshot-in-time assessment of performance within a source category, which necessarily includes the status of sources in that category at that moment in time. To do otherwise makes the process unworkable.

Moreover, although not necessary to the decision to deny reconsideration, the EPA has evaluated the practical implications of the solid waste definition and CISWI standards that it recently adopted. If the newly-adopted solid waste definition had been applicable at the time cement kilns conducted the performance testing used as the basis for the MACT standards and at the time of promulgation of the final Portland

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Cement NESHAP, 23 cement kilns (by the EPA's estimate) out of 146 would have been classified as incinerators. If these units were removed from the pool of cement kilns, the floors -- with one exception -- would have remained either identical or essentially identical and, since the EPA adopted the floors as the standards, the standards would likewise have remained identical or essentially identical. The one floor that would change appreciably is the floor for THC, which would become significantly more stringent because the revised data base would reflect cement kilns experiencing less variability in THC emissions.¹⁰ Given the minimal change in the standards, with the exception of the more stringent THC standard, kilns' compliance strategy would be unaltered.

¹⁰ Nor would EPA alter any of its determinations not to adopt more stringent beyond-the-floor standards.

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Table 1. Comparison Of Floors With and Without Kilns That Could Have Been CISWI Kilns had the Definition Of Solid Waste Applied¹¹

Pollutant	Existing Source Floor - 2010 Final Rule	Existing Source Floor - CISWI Kilns Removed from Inventory	New Source Floor - 2010 Final Rule	New Source Floor - CISWI Kilns Removed from Inventory
Mercury	55 lb/MM tons clinker	58 lb/MM tons clinker	21 lb/MM tons clinker	24 lb/MM tons clinker
Total Hydrocarbons	24 ppmvd	15 ppmvd	24 ppmvd	11 ppmvd
PM	0.04	0.05	0.01	0.01
HCl	3 ppmvd	3 ppmvd	3 ppmvd	3 ppmvd

In this analysis, the EPA finds that none of the cement kilns would have been potentially CISWI due to the use of

¹¹ In this analysis, nine of the eleven floor kilns for the final cement NESHAP remain cement kilns. One of the two floor kilns for THC would be a CISWI, although removing this kiln from the cement kiln data base would result in a significantly more stringent THC standard under the NESHAP because this kiln had more associated variability in its performance than the other kilns ranked closest to it. For PM, two of six kilns remain classified as cement kilns. For HCl, two of three floor kilns remain cement kilns, but there are a whole group of cement kilns that performed identically to the floor kiln for HCl that was, for purposes of our analysis, reclassified as a CISWI so there would be no effect on the standard. 75 FR at 54894 (standard based on analytic method detection limit times a variability factor rather than on the measured values because those values were so close to the analytic method minimum detection limit). See the memorandum Revised Floors without Kilns that Would have been CISWI Kilns Had the Solid Waste Definition Applied, dated April 25, 2011.

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secondary material ingredients (though some kilns would potentially have been CISWI due to secondary fuels burned). This is because none of these secondary ingredient materials identified by PCA as being used in cement kilns is considered to be combusted. A typical dictionary definition of "combustion" is "an act or instance of burning" or "a chemical process (as an oxidation) accompanied by the evolution of light and heat".¹² Cement kilns typically process ingredients in the cold regions of the kiln, where ingredients are gradually heated until they reach the temperature where clinker formation takes place. This is not a chemical process marked by the evolution of light and heat, and so is not combustion. Rather, it is analogous to cooking as opposed to burning.¹³ Cement kiln dust is also used as an ingredient and is sometimes processed in the hot end of the cement kiln. Due to its inorganic, essentially inert composition, this material is not combusted.¹⁴ Non-hazardous secondary materials *used as an ingredient* (as opposed to *being* combusted) in combustion units are not solid wastes under newly promulgated definitional rules (to be codified at 40 CFR section

¹² Webster's Ninth New Collegiate Dictionary. Merriam-Webster Inc. 1990.

¹³ See Combustion in a Cement Kiln and Cement Kilns' Use of Tires as Fuel dated April 25, 2011.

¹⁴ Id.

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241.3 (b) (3)), assuming the legitimacy criteria in section 241.3 (d) are satisfied.

The EPA's analysis also reflects the results of Information Collection Requests (pursuant to section 114 of the CAA) regarding cement kilns' use of tires as alternative fuels. Based on these ICR responses, the EPA finds that most of the responding cement kilns obtained tires from established tire programs as defined in newly promulgated part 241, and have reasonably established that the tires were not discarded and were handled as valuable commodities from the point of removal through arrival at the cement kiln and therefore would not have been solid wastes. The EPA does not interpret the certification required by section 60. 2175 (w) of the newly-adopted CISWI rule as requiring ultimate users to know the source of all tires obtained from an established tire collection program. This is a practical impossibility. In certifying, users also should not assume that tires from established programs which participate in occasional cleanup days were discarded. Rather, it is sufficient that the ultimate user verify that it is obtaining tires from an established tire collection program, which program can provide the user with reasonable assurance that it manages tires carefully from point of collection to point of burning and which

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does not receive tires which have been abandoned in landfills or otherwise.

There are further practical considerations, which likewise indicate the relative lack of practical effect of the solid waste definition and CISWI standards on the NESHAP. First, cement kilns can choose whether to continue burning solid waste and being classified as incinerators, or not burn waste and remain classified as cement kilns. Second, burning alternative fuels (whether classified as solid wastes or not) does not appreciably affect cement kilns' HAP emissions. 74 FR at 21138; Comments of PCA, Docket EPA-HQ-RCRA-2008-0329 (Aug. 3, 2010) (p. 27) (same). Thus, the measured performance of cement kilns that forms the basis of the standards in the NESHAP remains technically sound since that performance would remain the same whether or not kilns burn "solid waste" alternative fuels.

Finally, PCA points out that until there is a solid waste regulatory definition and a CISWI rule, its members lack the information to make a rational choice as to which source category to be subject to - whether or not to continue burning secondary materials and whether to invest immediately in the pollution control equipment and operational practices necessary for most kilns to comply with the Portland Cement NESHAP.

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Petition p. 18. The EPA has now adopted both a regulatory solid waste definition for non-hazardous secondary materials and CISWI standards, which should provide the basis for kilns to make these decisions within the necessary investment timeframe.

Conclusion

The EPA proposed to classify cement kilns burning secondary materials as cement kilns in the proposed rule, explained why it would do so, and finalized the NESHAP rule using the approach proposed. No objections to that approach were raised to the EPA during the rulemaking. We further reject the position that a solid waste definition adopted any time after promulgation of a NESHAP compels reexamination of the NESHAP because it alters the NESHAP's fundamental premises. The EPA appropriately develops NESHAPs, including the Portland Cement NESHAP, based on the information available to it at the time of the rulemaking and it is undisputed that the units in question here were cement kilns at the time of the final cement NESHAP. The EPA thus concludes that reconsideration here is neither required nor appropriate under section 307(d)(7)(B).

2. Standards During Periods of Startup and Shutdown

PCA maintains that the NESHAP's limits that apply during periods of startup and shutdown do not meet the requirements of

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CAA section 112(d)(2) because the standards rest on engineering estimates of performance rather than on performance data, and that the EPA failed to provide adequate notice and opportunity for comment. Petition pp. 14-16. With respect to the startup and shutdown standards, PCA has not demonstrated that it was unable to raise its objections during the public comment period.

Indeed, it did so. The EPA proposed that the same standards apply during startup and shutdown conditions as during normal operating conditions, and solicited any data which might show that some other standard would be more appropriate. 74 FR at 21162. PCA commented at length on these proposed standards. PCA Comments, pp. 7-8, 11-13. In response to PCA's own comment that the proposed startup and shutdown standards should not be normalized to units of production (PCA Comment of Sept. 4, 2009 at 7-8, EPA-HQ-OAR-2002-0051-2922.1), the EPA modified the proposed standards so that they are expressed as stack concentrations. 75 FR at 54991.

PCA's main contention is that the EPA based the standards for startup and shutdown on its engineering judgment, so that commenters have had no opportunity to comment on emissions data supporting those conclusions. Petition p. 15. PCA is correct that the standards reflect the EPA's engineering judgment, but

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the EPA may permissibly rely on engineering judgment in developing floor standards in a NESHAP. *Sierra Club v. EPA*, 167 F.3d 658, 665 (D.C. Cir. 1999); *National Lime*, 233 F.3d at 632; *Mossville Environmental Action Now v. EPA*, 370 F.3d 1232, 1241-42 (D.C. Cir. 2004); see also CAA section 112(d)(3)(A).

Furthermore, neither PCA nor any other commenter provided emissions data for startup and shutdown operations, despite the EPA's request. 74 FR at 21162.

Under these circumstances, the EPA believes that the petitioner both had the opportunity to raise its objections during the public comment period and did so. Reconsideration is therefore neither required nor appropriate.

The EPA, however, is granting reconsideration of one issue related to standards during startup and shutdown. This is the standard for HCl during startup and shutdown for kilns equipped with wet scrubbers but which do not use a continuous emissions monitor (CEM) to measure compliance. See issue B.4 below.

3. Standards for Particulate Matter

PCA states that in the final rule "EPA dramatically deviated from the range of possible limits that it had proposed for particulate matter ... by almost 90 per cent" for new facilities and by nearly 50 percent for existing facilities.

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Petition p. 16. PCA further maintains that this change resulted from "cherry picked" data, with the expanded dataset "arbitrarily and capriciously biased towards top performers," those with new baghouses. Id. PCA further states that it was unable to comment on these data because the EPA did not make the data available until after promulgation of the final rule, and that the limits may not be achievable for sources that use wet scrubbers for acid gas control due to loadings of re-entrained particulate. Id. at 17. PCA raises the same issues with respect to the PM limit in the NSPS, which is identical to the new source standard under the NESHAP. Id.

This part of PCA's petition is largely mistaken, and does not present any grounds requiring the EPA to reconsider the PM standard in either the NESHAP or the NSPS. Indeed, PCA's public comments suggested a different PM limit than proposed based largely on the additional performance data for which they now claim lack of notice. PCA Comments at p. 86 and App. 1 to those comments. See docket items EPA-HQ-OAR-2002-0051-2922.1 and 2922.2, September 4, 2009. Much of this information had already been submitted to the EPA by PCA and individual PCA members in the parallel NSPS rulemaking as well. See National Emission Standards for Hazardous Air Pollutants from the Portland Cement

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Manufacturing Industry Response to Comments Received on Proposed Rule (Aug. 6, 2010) ("RTC") p. 155. See docket item EPA-HQ-OAR-2002-0051-3464. PCA thus not only had an opportunity to comment on the data used by the EPA for the final standard, but did so.

Nor did the EPA "cherry pick" among those data. See RTC at pp. 155, and 153-55 demonstrating the opposite: PCA had used the data selectively in constructing the alternative standard suggested in its comments, but the EPA's analysis used all of the additional data from the pool of best performing sources for PM.

PCA is also mistaken in its claim that it lacked opportunity to present its objection that the PM standard is based on unrepresentative performance because it was based on performance of plants with newly-installed baghouses. Indeed, it raised this issue in its public comments. PCA Comments at 86; see also RTC at pp. 155-56 indicating that baghouse performance can improve over time but is characterized by operating variability both when a baghouse is new and throughout its operating life. Commenters likewise raised the issue of baghouse performance decreasing due to re-entrained particulate resulting from use of wet scrubbers for acid gas control, and the EPA responded by citing data showing that PM levels from a cement

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kiln baghouse decreased after the kiln installed a wet scrubber to control its acid gas emissions. RTC at p. 158. Since there was ample notice and opportunity for comment on these issues (and, as just indicated, actual comment), the EPA is not required to reconsider them.

In its December 14, 2010, letter, PCA takes a different tack, stating that the PM standard in the final NESHAP and NSPS is expressed as a 30-day rolling average rather than as a 1-day average (as at proposal), and that the EPA used a statistical equation, the Upper Prediction Limit at the 99th percentile (UPL 99) to construct that limit. December 14 letter pp. 3-4. The letter asserts that PCA lacked notice of either issue.

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PCA is correct that the final standard is expressed as a 30-day standard (met by averaging 30 daily observations per month). 75 FR at 54988.¹⁵ The EPA stated at proposal that it was considering adopting a PM standard whereby compliance would be measured with a CEM, and that CEM-based standards would be expressed as 30-day numbers. The EPA further had presented the statistical means of converting individual measurements into 30-day averages by means of the UPL 99 equation. 74 FR at 21157, 21158, 21141-42. PCA's comments criticized use of the UPL 99 equation both generally, and for a PM standard specifically (PCA Comments pp. 5, 86), and documented their view that the UPL equation underestimated variability for PM generally and underestimated the projected 99th percentile of the distribution of PM values (PCA Comments at App. 2 p. ES-7 and App. 2 p. 5-5). See also the EPA's responses at 75 FR at 59474-76; Development

¹⁵ PCA is not correct, however, that the standard became dramatically more stringent. If expressed as a not-to-exceed limit, as at proposal, the final existing source standard under the NESHAP would be approximately 0.07 lb/ton clinker, or only about 12 per cent more stringent than proposed. This slight increase in stringency results from corrections to the UPL equation used at proposal, corrections made in response to comments submitted by PCA. The additional performance data for PM actually made the standard less stringent (the net slight increase in stringency resulting, as noted from the revised UPL equation to the new data set). Development of the MACT Floors for the Final NESHAP for Portland cement (EPA, August 6, 2010, Docket # 4550) at p. 16.

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of the MACT Floors for the final Portland Cement NESHAP (the EPA, August 6, 2010, docket item EPA-HQ-OAR-2002-0051-4550) at pp. 2-4, 9-10, 17, explaining why the UPL 99 equation is a reasonable statistical tool for assessing variability, including variability over a 30-day measuring period.¹⁶ PCA and member companies likewise submitted detailed comments questioning the reliability and suitability of PM CEMs and urged the EPA not to require their use in measuring the standard. RTC at pp. 163-67. The EPA consequently does not accept the contention that commenters lacked notice of these issues and that reconsideration is either required or appropriate.

¹⁶ The argument that the UPL equation underestimates variability of PM control performance because it underestimated variability for performance of THC is misleading. The UPL equation measures potential variability based on the within-source variance and between-source variance of the data set to which it is applied. 74 FR at 21141. The EPA's initial data set for THC was comparatively sparse, and did not fully reflect the best-performing sources' within-source variation and between-source variation. The EPA was able to gather additional performance data between proposal and comment to expand those data (and to calculate variability directly from the data; see 75 FR at 54980 n. 22). However, the problem was not the UPL equation but the data set to which it was applied. It also should be noted that baghouses controlling PM (the control device for all of the best performing cement kilns) are relatively impervious to input loadings, performing relatively constantly regardless of incoming ash load. 70 FR at 59449 (Oct. 12, 2005); 72 FR at 54879 (Sept. 27, 2007). Baghouse variability thus can be assessed especially reliably by standard statistical means, such as the UPL equation. Id.

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The EPA, however, is granting reconsideration of two standards related to PM, the NSPS for PM as applied to modified sources, and the alternative PM compliance alternative for sources that commingle certain internal exhaust gas streams. See issues B. 6 and B. 9 below.

4. **Monovents**

Petitioner Eagle Materials claims that it lacked notice of the EPA's basis for requiring use of CEMs for all cement kilns, including those having monovent exhaust configurations (vents on the top of a control device rather than a single stack). This issue was presented at proposal, and the company submitted comments on the issue, as the petitioner acknowledges. Petition at pp. 3, 5-9. The petitioner disagrees with the EPA's response (which indicated that a source could install a separate stack for measurement purposes or seek an alternative monitoring regime on a site-specific basis pursuant to the authority at 40 CFR section 63.7 (f), RTC at pp. 75, 120, 145-46, 172-73), but this does not demonstrate that there was a lack of opportunity to comment on the issue. The EPA is consequently not granting this petition.

Although we are denying the request for reconsideration of the monitoring provisions for facilities with monovents, we note

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further that these types of monitoring issues tend to be very site specific, and there will likely be individual cases where the national rule will be impractical. The provisions of section 63.7 (f) of the General Provisions exist for this purpose and we believe that issues related to monitoring facilities with monovents are best handled on a case-by-case basis under that rule. These provisions have been used in similar situations to authorize cost-effective, environmentally appropriate alternative monitoring and, to our knowledge, have not in and of themselves required the construction of a single stack.

5. Emissions from Crushers

Crushers are machines designed to reduce large rocks from a quarry into gravel-sized feed. See section 63.1341 (definition of "crusher"). Crushers are typically located at the limestone quarry. In 2002, the EPA and the PCA entered into a settlement agreement regarding the 1999 NESHAP for the industry and, as part of that agreement, agreed to clarify that crushers are not part of the Portland cement source category. The EPA did so but used convoluted language¹⁷ which created unnecessary confusion

¹⁷ Former section 63.1340 (c) stated:

"For portland cement plants with on-site nonmetallic mineral processing facilities, the first affected source in the sequence of materials handling

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about collateral issues such as the regulatory status of other types of equipment such as storage bins. In the 2005 rule proposing to amend the NESHAP, the EPA proposed to eliminate the confusing language and simply state that crushers are not part of the Portland cement source category, and indicated in the preamble to the 2006 final rule that it intended to finalize this language. See 70 FR at 72341-42 (Dec. 2, 2005) and 71 FR at 76532 (Dec. 20, 2006). The EPA neglected to include the necessary rule language, and proposed to add it in this rulemaking. 74 FR at 21163. The final rule states that "[c]rushers are not covered by this subpart regardless of their location." Section 63.1340 (c); see also RTC at p. 212

operations subject to this subpart is the raw material storage, which is just prior to the raw mill. Any equipment of the on-site nonmetallic mineral processing plant which precedes the raw material storage is not subject to this subpart. In addition, the primary and secondary crushers of the on-site nonmetallic mineral processing plant, regardless of whether they precede the raw material storage, are not subject to this subpart. Furthermore, the first conveyor transfer point subject to this subpart is the transfer point associated with the conveyor transferring material from the raw material storage to the raw mill."

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(explaining these actions and citing to earlier regulatory history).

PCA asks that the EPA reconsider its decision and restore the amended regulatory text quoted below. Petition Exhibit 1. The EPA has provided numerous opportunities to comment on this issue so reconsideration is clearly not compelled under section 307 (d) (7) (B). Nor is reconsideration appropriate. The former regulatory text created confusion about collateral issues and failed to indicate clearly its ostensible subject - that crushers are not regulated under the Portland Cement NESHAP. The EPA has amended the rule to make this clear. Doing so is consistent with the 2001 Settlement Agreement on this point, the object of which was to make clear that crushers were not regulated under the NESHAP. In any case, nothing in that settlement agreement prevents the EPA from amending its regulations if it is appropriate to do so. The agreement in fact states that "[n]othing in this Agreement shall be construed to limit or modify the EPA's discretion to alter, amend, or revise, or to promulgate regulations that supersede, the regulations identified in section III of this Agreement."

B. Issues on Which the EPA is Granting Reconsideration

1. Standards for Clinker Storage Piles

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PCA and Eagle Materials both maintain that the EPA did not provide sufficient notice of the standards it might adopt for clinker storage piles. Although the EPA did give notice that it might adopt standards for these units (74 FR at 21163), the petitioners are correct that the Agency did not give sufficient notice of what those standards might be. The EPA is consequently granting the petition as to this issue. For the same reason, the EPA is granting the petition as to all of the miscellaneous issues pertaining to clinker storage piles (issues 1-4 in Exhibit 1 to PCA's Petition for Reconsideration).

2. Affirmative Defense to Civil Penalties for Exceedances Occurring During Malfunctions

Various petitioners representing environmental advocacy groups, as well as PCA, assert that the EPA adopted in the final rule an affirmative defense to civil penalties for exceedances of applicable emission standards during periods of malfunction. Section 63.1344. The petitioners are correct that there was not a proper opportunity to comment on this provision at proposal, and the EPA is therefore granting these petitions as to this issue.

3. Continuously Monitored Parameters for Alternative THC Standard

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Section 63.1343 (b) (1) provides two options for meeting a standard for organic HAP. One is to meet a THC standard of 24 parts per million by volume dry (ppmvd); the other is to meet a limit of 9 ppmvd of total organic HAP. If the source elects to meet the total organic HAP standard, a site specific THC limit is established based on the THC results during the performance test used to establish compliance with the total organic HAP limit. Section 63.1348(a) (4) (v).

PCA has noted that the site specific THC limit can unintentionally deprive kilns of operating flexibility where kilns have measured total organic HAP comfortably below the alternative standard. For example, if a kiln has measured total organic HAP of 3 ppmvd and site specific levels of THC of 15 ppmvd during the performance test, it would be de facto subject to a considerably more stringent THC standard than if it were subject to the main THC standard.

The EPA believes that the issue of unnecessarily constrained operating flexibility is worthy of reexamination and therefore is granting reconsideration of this issue.

4. HCl Limit of Zero During Startup for Sources That Do Not Have a CEM

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The final cement NESHAP provides that existing and new kilns have a standard of zero for HCl when operating at startup and shutdown and when compliance is measured by means other than a CEM. Section 63.1343(b) Table 1 note 4. Kilns equipped with wet scrubbers may elect to comply with the HCl standard by means of performance tests rather than a CEM, so the practical effect of this provision is that wet-scrubber equipped kilns electing to comply by means of stack testing rather than continuous monitoring of HCl with a CEM would be subject to the emission limit of zero during startup and shutdown. See sections 63.1348(a)(6)(i) and 63.1349(b)(6)(i)(a). PCA indicates in its petition that the EPA is incorrect in finding that HCl is formed only from burning normal fuel (75 FR at 54992). PCA maintains that HCl can be formed by oxidizing chlorides in the raw materials present in the kiln regardless of the type of fuels used, and so can be present in emissions during startup and shutdown. PCA urges that the same limit (3 ppmvd) apply during startup as applies to all other kilns during all operating conditions. Petition Exhibit 1.

The EPA is granting reconsideration on this issue since PCA's petition may have technical merit.

5. Allowing Sources With Caustic Scrubbers to Comply With HCl Standard Using Performance Tests

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As just noted, the final rule allows sources equipped with wet scrubbers (and tray towers) to comply with the HCl standard by means of performance tests rather than with continuous monitoring of HCl with a CEM. (Sources electing to comply by means of stack tests do establish continuously monitored parameters - liquid flow rate, pressure and pH (see section 63.1350 (m) (5)-(7)). PCA indicates that this compliance option should not be limited to wet scrubber equipped units, but should also be available for units equipped with caustic scrubbers, in part because some sources will be equipped with dry scrubbers (due to water shortages) and should have the same operating flexibilities as wet scrubber-equipped kilns.

The EPA is granting reconsideration to consider the issue of whether dry scrubber-equipped kilns should have the option of complying by means of stack tests rather than continuous monitoring.

6. Alternative PM Limit

Some kilns combine kiln exhaust gas with exhaust gas from other unit operations, including the clinker cooler. See 75 FR at 54988. The final cement NESHAP seeks to accommodate these situations by providing for a site specific PM limit for commingled flows from the kiln and clinker cooler. Section

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63.1343(b)(2). PCA points out, however, that other flows can be commingled as well. PCA Petition Exhibit 1 (referring to coal mill exhaust and exhaust from an alkali by-pass as instances of additional flows). Without an allowance for these additional flows, the site specific PM limit could be stricter than the EPA intended (since the PM concentration will be divided by a lower number in the implementing equation), and could penalize the environmentally beneficial practice of commingling these flows, a practice resulting in significant energy savings. 75 FR at 54988. The EPA therefore grants reconsideration on this issue.

7. Monitoring for Mercury and PM During Periods of Startup and Shutdown

The standards for the four main pollutants regulated by the NESHAP (mercury, THC/organic HAP, HCl, and PM) are all measured continuously. This is true of the standards applying during normal operation and those that apply during startup/shutdown. However, two of the standards - for mercury and for PM - are normalized to production units during normal operation and expressed on a concentration basis during startup/shutdown. See 75 FR at 54991-92.

PCA suggests in its petition that cement companies would like to utilize the same monitoring device for both standards,

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but that this could pose operational obstacles if sorbent traps are used as the continuous monitoring device. Petition Exhibit 1. This is because data from a sorbent trap cannot be readily disaggregated, meaning that a dedicated trap would be needed to monitor startup and shutdown and a different sorbent trap used for normal operation. (Data from a CEM can be disaggregated, so that it is possible to evaluate data from startup/shutdown and normal operation from measurements taken by a single PM and mercury CEM.) PCA questions if this was the EPA's intent.

The EPA is granting the petition to consider the question of types of continuous monitoring allowed during startup and shutdown for mercury and PM.

8. Coal Mills (NESHAP and NSPS)

In the EPA's recent amendments to the Standards for Performance for Coal Mills, we exempted coal mills at cement manufacturing facilities whose only heat source was kiln exhaust. See 74 FR 51952, October 8, 2009. This change was made in response to comment from PCA. PCA argued that coal mills were similar to inline raw mills. In the case of inline raw mills, we consider the raw mill to be an integral part of the kiln. PCA requested the same treatment for coal mills, and the EPA agreed. However, in the amendments to the Portland Cement NESHAP and

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NSPS, the EPA did not address coal mills. This omission was due to the lack of information on emissions from coal mills. The EPA is granting reconsideration to reconsider the status of coal mills under the cement NESHAP.

9. **PM Standard for Modified Sources under the NSPS**

The EPA adopted the level of the new source standard under the NESHAP as the NSPS for both new and modified kilns. 75 FR at 54996. As PCA notes in its petition, there need not be functional equivalence between the NESHAP and NSPS PM limits for modified kilns, and further comment on the issue is appropriate. Petition p. 17. PCA also notes that the NSPS for modified kilns could have associated costs which need to be accounted for pursuant to CAA section 111 (a) (1). Since such kilns would not be subject to the section 112 (d) new source standard, any costs for such modified kilns to control PM to the new source limit could not be attributed to the section 112 (d) new source limit. In addition, PCA notes that existing Portland cement kilns cannot be assumed to find ways to avoid triggering the NSPS modification criteria when making physical or operational changes due to the stringency of the newly adopted standards for PM.

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The EPA believes that PCA's arguments on this point have merit and warrant reconsideration of the NSPS standard for PM for modified kilns.

IV. **Requests for an Administrative Stay**

PCA also requests that the EPA issue an administrative stay of the rule pursuant to section 705 of the Administrative Procedure Act (APA), which authorizes an agency, when it finds that "justice so requires" to "postpone the effective date of action taken by it, pending judicial review. Petition p. 6. PCA also alludes to the authority in section 307 (d) (7) (B) of the CAA under which the EPA may issue a stay for up to three months if it grants a petition to reconsider a final rule.

First, the effective date of the NESHAP and NSPS - November 8, 2010 - has already passed and thus a stay under APA section 705 is not appropriate. See 76 FR 4780, 4800 (Jan. 26, 2011) ("[p]ostponing an effective date implies action before the effective date arrives").

Section 307 (d) (7) (B) of the CAA authorizes the EPA to stay a rule's effectiveness for three months during reconsideration. Since the EPA is largely denying the petitions to reconsider and is not granting reconsideration as to challenges to the

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principal standards in the NESHAP or NSPS, an administrative stay is not appropriate under that authority.

In reaching these conclusions, the EPA evaluated not only the legal applicability of the statutory provisions cited in PCA's petition, but also the merits criteria for granting stays - the likelihood of success on the merits, possibility of irreparable harm to the petition, harm to other parties, and the ultimate public interest. As discussed above, the EPA believes that the NESHAP is validly based on the performance of cement kilns. The EPA's technical evaluation of kilns' performance is also sound because burning alternative fuels (whether or not those fuels are classified as solid waste) does not appreciably effect the amount of HAP cement kilns emit.

The EPA also does not believe that the industry is facing the prospect of irreparable harm. As explained above, the industry's legitimate concern of having to make critical investment decisions without knowing the final rules on waste classification and standards for solid waste incinerators has been rectified by the EPA's issuance of a final regulatory definition of non-hazardous secondary materials that are solid waste and CISWI standards. In addition, given the similarity of

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many of the emissions limits, the compliance strategy for either rule would be expected to be similar.

Moreover, the EPA does not believe that a stay of the rules' compliance date is in the public interest. The standards in the rule are projected to result in significant health benefits (thousands of serious health incidences avoided, including thousands fewer acute myocardial infarctions) and the rules' monetized benefits are projected to substantially exceed the rules' social costs. 75 FR at 55027 Table 13 and 55028 (social costs estimated at \$926 to 950 million (2005\$) and net monetized benefits are estimated at \$6.5 billion to \$18 billion (2005\$ and a 7 percent discount rate). Cement kilns' mercury emissions are among the highest of any emitting source category, and contribute significantly to the national inventory of airborne mercury. 75 FR at 54979 (cement industry contributes 7.5 tons of mercury emissions per year to national inventory of 50 tons per year). We note that mercury is a potent and bioaccumulative neurotoxin that remains in the environment for an extended period of time. As a result, the additional mercury that would be emitted as the result of a stay of the rule would remain in the environment for many years. The NESHAP here for the first time adopts statutorily-compliant limits to control

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those emissions. The EPA does not believe it in the public interest to delay those controls.

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**National Emission Standards for Hazardous Air Pollutants From
the Portland Cement Manufacturing Industry and Standards of
Performance for Portland Cement Plants**

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V. Conclusion

For all of the reasons discussed above, the petitions to reconsider the final NESHAP and NSPS for Portland cement plants are denied in part and granted in part. The EPA likewise denies the petitions for an administrative stay.

Dated:

Lisa P. Jackson,
Administrator.